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(1)



In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 468

JOHN BARCOTT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The District Court rendered no opinion. The opinion of the Court of Appeals (R. 486-493) is reported in 169 F. 2d 929.

JURISDICTION

The judgment of the Court of Appeals was entered on September 17, 1948. (R. 494.) Re-hearing was denied on November 1, 1948. (R. 495.) The time for filing a petition for a writ of certiorari was extended to December 20, 1948, by order of the Chief Justice (R. 497); and the peti-

tion was filed on December 17, 1948. The jurisdiction of this Court is invoked under 28 U. S. C. 1254. See also Rules 37 (b) and 45 (a) of the Federal Rules of Criminal Procedure.

QUESTIONS PRESENTED

1. In a criminal action for wilful evasion of income tax payments for 1943, 1944, and 1945, whether proof of additional unreported net income for each of the years involved may rest upon demonstrated yearly increases in net worth plus evidence from which the jury could properly infer that the petitioner had insufficient other assets at the beginning of the period with which to account for the increases during the taxable years.
2. Whether the proof transcended the allegations in the bill of particulars.

STATUTE INVOLVED

Section 145 of the Internal Revenue Code, 26 U. S. C. 145, provides in pertinent part:

SEC. 145. PENALTIES.

* * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat

any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than \$10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

STATEMENT

The petitioner was charged in a three count indictment returned in the Western District of Washington with having wilfully attempted to evade and defeat a large part of his individual income taxes for the calendar years 1943, 1944, and 1945, in violation of Section 145 (b) of the Internal Revenue Code. The indictment alleged the following evasion:

Calendar year	Income reported	Actual income	Tax reported	Actual tax due
1943.....	\$6,720.40	\$12,406.33	\$1,545.38	\$3,646.25
1944.....	5,632.57	9,926.61	1,288.45	2,727.85
1945.....	7,388.98	11,138.92	1,633.36	3,201.96

These figures reflect a division of net income and tax liability on the community property basis. (R. 2-5, 130-131.)

At the trial, evidence was introduced from which the jury could find the following facts:

From the year 1919, to and including February, 1946, the petitioner conducted a restaurant business in the city of Tacoma, Washington. His income tax returns were not challenged until

certain money transactions in which the petitioner was involved were reported to the Treasury Department; and an investigation was then ordered. The particular money transaction which aroused the curiosity of the Treasury Department was an exchange, by the petitioner, of currency of ordinary denomination for ten \$1,000 bills. The bank with whom this exchange was had made the report to the Treasury Department. (R. 486.)

One Nielsen, a revenue agent, was assigned to make the investigation. He contacted the petitioner and informed him that he was investigating the currency exchange. The petitioner volunteered to go with Agent Nielsen to a certain bank and exhibit to him the ten \$1,000 bills which Agent Nielsen had been told that the petitioner had received in exchange for currency of smaller denominations. The petitioner informed Nielson that the ten \$1,000 bills were in a safety deposit box. Upon arrival at the bank, the petitioner produced two packages of currency which he took from his person. The packages each contained ten \$1,000 bills, totalling \$20,000. The safety deposit box, which was then opened, was found to contain \$3,000 in cash and Government bonds of the face value of \$75,000. The Agent then began making an inventory of the contents of the safety deposit box. While Nielsen was so engaged, the petitioner made a proffer to him of one of the bundles of money, found in the box, containing \$500. The

petitioner stated to Nielsen: "You make a favorable report on this matter and just forget about the whole thing." Agent Nielsen declined the offer. The petitioner persisted and made a further offer, stating: "Now Nielsen, we are alone, only two of us, can't you take a package of this and make a favorable report on it?" Again being rebuffed by the agent, the petitioner endeavored to raise the amount of the proffered bribe, stating: "I feel sick inside. Let me buy you a suit of clothes and your wife a fur coat, and you take this money and make a favorable report on me." Again, the Agent rejected the offer. (R. 486-487.)

At a later date, Agents Nielsen and Swanson inventoried the contents of the safety deposit box and found the contents to be the same as upon the previous examination by Nielsen. The inventory of the bonds contained in the safety deposit box disclosed that during the year 1943 the petitioner purchased bonds at a cost to him of \$20,750. During 1944, the war bond holdings of the petitioner were increased at a cost to him of \$19,000, and in 1945, the increase was at a cost to the petitioner of \$20,000. (R. 488.)

On the basis of all available records (R. 118), Agent Swanson made a computation of the petitioner's net worth at the beginning of 1943 as \$57,278.56; at the end of 1943, this net worth was \$79,206.60. The increase in 1944 was to the sum

of \$97,462.75 and in 1945, to \$116,316.60. The total increase during the three years was \$59,039.04 (R. 488), as against a total net reported income of \$19,741.95 (R. 2-5). This net worth computation assumed, to petitioner's advantage, that he had retained since 1942 the \$23,000 in cash which he had on his person and in his safety deposit box during the investigation in 1946. (R. 120-1.)

There was also testimony that, from 1919 through 1942, the petitioner reported a tax liability in only four years: 1929, \$12.07; 1936, \$17.25; 1937, \$3.81; 1938, \$10.29. In 1942, he reported a taxable income of \$8,236.30. On the basis of these figures, the maximum taxable income attributable to the petitioner was \$89,291.09, from 1919 through 1942. (R. 143.) Allowing for minimum living expenses (\$125 a month for his wife and his family), Agent Swanson testified that, based on the income tax returns filed during the period 1919 through 1942, the petitioner had a possible net worth at the beginning of 1943 of \$53,000, or \$4,278 less than the net worth actually used by Swanson in his computation of tax liability described above. (R. 144.)

The petitioner claimed at the trial that from 1919 to 1940 he had saved in cash "about sixty-sixty-five thousand or something like that." (R. 271.) His accountant, Robert E. Birch, made a computation of the petitioner's net worth for

1942, based upon information given him by the petitioner. The methods used by Birch in arriving at the net worth were much the same as those employed by Agent Swanson, although the results varied substantially as to the amount. (R. 488-489.) Birch testified that "it would have been possible to build up perhaps a cash of sixty-two thousand dollars" at the end of 1942. (R. 383.)

The Government proved that the petitioner owned stock in the Fisherman's Packing Corporation, and that he surrendered some of these shares in 1942 in order to pay off a note in the sum of \$200 in favor of the corporation, and which had been due and owing since 1932. This stock was income producing; a dividend of 6% was paid on it within 20 days after the petitioner's surrender of a portion of the shares in payment of the note. It was also shown that during the years from 1937 to 1942, the petitioner had purchased furniture and equipment on installment contracts. (R. 488.)

On the evidence before it, the jury found petitioner guilty of each count of the indictment. (R. 37.) His motion for a judgment of acquittal, or, in the alternative, for a new trial was denied. (R. 38-42.) The Court of Appeals for the Ninth Circuit affirmed, holding that the evidence was sufficient to support the verdict. (R. 486-493.)

ARGUMENT**I**

The petitioner asserts, in effect, that the Government failed to prove additional net income in each year in excess of the amounts reported in the respective returns. This claim turns on the hypothesis that the demonstrated net worth increases in 1943, 1944, and 1945 do not require the conclusion that the increases were derived from current income. There are at least two complete answers to the alleged grievance.

Firstly, it is undisputed that the petitioner purchased United States bonds during the taxable years at the following cost: 1943, \$20,750; 1944, \$19,000; 1945, \$20,000. (R. 488.) He reported net income as follows: 1943, \$6,720.40; 1944, \$5,632.57; 1945, \$7,388.98. It is not necessary to consider here whether the overwhelmingly disproportionate relationship between reported income and these expenditures alone warranted a finding that the expenditures were made out of current income (*United States v. Johnson*, 319 U. S. 503, 517, rehearing denied, 320 U. S. 808), since the record discloses that the petitioner would "ordinarily accumulate five or six thousand dollars, and purchase United States Savings bonds." (R. 72.) The petitioner's admission in this regard fully warranted the conclusion that the bonds were purchased out of current income. (R. 490-491.) The court below likewise considered it significant

that the bonds were purchased at comparatively regular intervals, a method usually employed by those accumulating funds from time to time throughout the year.

Secondly, despite the petitioner's insistence to the contrary (Pet. 12-14), proof of additional net income in this case did not rest solely on the mere demonstration of net worth increases in each of the taxable years (1943, 1944, and 1945), without proof of the non-existence of prior accumulated funds or of assets in excess of the net worth attributed to the petitioner at the beginning of 1943. The record contains unmistakable evidence of the non-existence of any sufficiently substantial amount of assets prior to the beginning of 1943. Although the petitioner had testified that from 1919 to 1940 he had accumulated some \$65,000 in cash (R. 271), the Government adduced evidence that his maximum net worth as of January 1, 1943, computed on the basis of the returns which the petitioner had filed from 1919 to 1942, inclusive, was even less than the amount upon which the computation of liability for prosecution purposes was predicated (R. 143-144); that from 1937 to 1942, he had purchased furniture and equipment on installment contracts; and that in 1942, he had surrendered some shares of stock in order to liquidate an indebtedness of \$200 which had been extant since 1932, the stock paying a 6% dividend within 20 days after surrender (R. 488).

Supra pp. 6-7. This evidence surely permitted the inference, if it did not require it, that the petitioner had no accumulated funds at the beginning of 1943 sufficient to account for the total net worth increase of approximately \$65,000, or any substantial part of it. (R. 488.) It justified the jury's disregard of the testimony of the petitioner and his witnesses touching alleged sources of prior accumulated funds. Under these circumstances, the prosecution's theory that income tax evasion could be shown from the annual increases in petitioner's net worth was sound, and the proof implementing it fully sustained the verdict. See *United States v. Chapman*, 168 F. 2d 997 (C. A. 7), certiorari denied, 335 U. S. 853; cf. *United States v. Potson* (C. A. 7), decided December 23, 1948 (Prentice-Hall 1949 Tax Service, par. 72, 284).

II

The bill of particulars stated that the item "income from business" in each count of the indictment referred to the petitioner's restaurant business known as the California Oyster House. (R. 17-18.) The petitioner claims that the proof transcended the scope of the bill, in that there was no proof that the unreported income was derived from this source (Pet. 2-3, 14-16.) The contention is without merit. As stated above, the proof of net worth increases in the taxable years, plus evidence of the nonexistence of prior ac-

cumulated assets, warranted findings that the petitioner earned net income in each of the years involved, exceeding the amounts reported. However, in addition to the proof of additional net income, the record showed clearly that the petitioner currently was engaged in an income producing retail business. (R. 491.) This concomitance of proof warranted a finding that the unreported net income was derived from the petitioner's conduct of the California Oyster House. Cf. *United States v. Johnson, supra*; *United States v. Chapman, supra*; *United States v. Potson, supra*.

The petitioner's complaint is groundless for the further reason that the indictment and the bill of particulars precisely informed him of the nature of the offenses charged, and of the general character of the evidence the Government expected to rely upon to sustain those charges. He was not entitled to more. *United States v. Skidmore*, 123 F. 2d 604 (C. A. 7), certiorari denied, 315 U. S. 800. No possible error may be urged on the basis of the alleged variance, particularly in view of the grave doubt expressed by the trial court (R. 170) that the petitioner was entitled to a bill since he had so conducted his affairs as to make it difficult, if not impossible, for the Government to particularize.

CONCLUSION

The decision below is in all respects correct. No important question of law or conflict of decisions is presented. It is therefore respectfully submitted that the petition should be denied.

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JANUARY, 1949.